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Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

MICHAEL TESTON,

Petitioner,

v.

ARKANSAS STATE BOARD OF CHIROPRACTIC EXAMINERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORI TO THE SUPREME COURT OF ARKANSAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner, Michael Teston, a licensed physical therapist in Arkansas, was assessed a $10,000.00 civil penalty by the Arkansas Chiropractor Board for violating constitutionally vague provisions of the Arkansas Chiropractic Practices Act. Mr. Teston appealed the Chiropractor Board's decision, and the Arkansas Supreme Court held that Mr. Teston's argument that the Arkansas Chiropractic Practices Act was unconstitutionally vague was not preserved for appeal, because it was not properly raised at the administrative level even though the Chiropractor Board had no authority to rule on whether or not the Arkansas Chiropractic Practices Act was unconstitutional. This Petition presents the following question:

Whether a state can require a citizen, consistent with due process, to raise a federal constitutional argument in a state administrative hearing in order to preserve the issue for adjudication in state court, when the administrative body has no authority under state law to consider the constitutional issue.

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The opinion of the Arkansas Supreme Court is reported at 2005 WL 77805 (Ark.) and 2005 Ark. LEXUS 214.

STATEMENT OF JURISDICTION

The Arkansas Supreme Court decided the case below on April 7, 2005, and a timely petition for rehearing was denied without opinion on May 26, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix reproduces the text of the Due Process Clause, U.S. Const. amend. XIV, § 1; the Supremacy Clause U.S. Constitution Article VI, Cl. 2; provisions of the Arkansas Chiropractic Practices Act, Ark. Code Ann. § 17-81-101 *et seq.*; Physical Therapist Act, Ark. Code Ann. § 17-93-101, *et. seq.*; provisions of the Arkansas Administrative Procedure Act, Ark. Code Ann. § 25-15-201, *et seq.*; and selected regulations of the Arkansas Register, 12 Ark. Reg. Nos. 1, 2 and 3, Docket No. 029.00.88-003 (1988).

STATEMENT OF THE CASE

This case results from a $10,000.00 civil penalty awarded in an administrative hearing enforcing an unconstitutionally vague statute. Michael Teston has practiced as a licensed physical therapist in Arkansas for more than 20 years. In 2001, Mr. Teston treated Katherine Fryar who had been referred to him for physical therapy by a physician. Over a year after Mr. Teston had treated Ms. Fryar, she submitted a

complaint to the State Board of Chiropractic Examiners (the "Chiropractor Board") resulting in an investigation by the Chiropractor Board as to whether Mr. Teston was practicing chiropractic without a license in violation of Arkansas Chiropractic Practices Act. Ark. Code Ann. § 17-81-303 (Repl. 2002). The Chiropractor Board sent its undercover investigator posing as a patient to Mr. Teston for treatment, and he too filed a complaint to the Chiropractor Board.

Prior to action by the Chiropractor Board, the Arkansas Board of Physical Therapy ("Physical Therapy Board") met to consider the complaints of Ms. Fryar and the Chiropractor Board's investigator. The Physical Therapy Board entered a declaratory order finding that the procedures that were the subject of the complaints were "mobilization" within the scope of Mr. Teston's profession as a physical therapist under the Arkansas Physical Therapy Act. Ark. Code Ann. § 17-93-101, *et seq*.

The Chiropractor Board then held a hearing concerning the same complaints, and in direct irreconcilable conflict with the Physical Therapy Board's order, the Chiropractor Board ruled that the complained of procedures were "manipulation" reserved for licensed chiropractors, and that Mr. Teston violated the Arkansas Chiropractic Practices Act. As a result of this ruling a $10,000.00 civil penalty was assessed against Mr. Teston. In the Chiropractor Board hearing, his attorney did not formally raise the constitutional question that the Arkansas Chiropractic Practices Act was unconstitutionally vague, since manipulation or mobilization are similarly defined.[1]

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1. Ark. Code Ann. § 17-81-102(6)(A) defines the "practice of chiropractic" to include "**spinal manipulations** and **spinal**

(Cont'd)

But when Mr. Teston appealed the Chiropractor Board's decision to the Pulaski County Circuit Court, he raised the constitutional issue. That court confirmed the ruling of the Chiropractor Board. Mr. Teston appealed to the Supreme Court of Arkansas which refused to consider Mr. Teston's constitutional claim, because it was not first raised at the administrative level. In its ruling, the Arkansas Court stated that "in order to preserve a constitutional argument in an appeal from an agency decision the constitutional issue must first be raised and developed at the administrative level." Opinion, p. 16. This ruling was in spite of the fact that Mr. Teston had raised this argument to the Pulaski Circuit Court, the first court having jurisdiction to decide a constitutional issue.

The Arkansas Supreme Court relied heavily on its own ruling in *AT&T Communications of the Southwest, Inc. v. Arkansas Public Service Commission*, 344 Ark. 188, 40 S.W.3d 273 (2001), which established that an administrative agency in Arkansas may not declare a statute unconstitutional because it violates the separation of powers doctrine. "However, this does not mean that a constitutional issue

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(Cont'd)

mobilizations such as any type of pressure, force, thrust or passive movement, . . . applied to the spinal vertebrae or their adjacent articulations by hand or mechanical device or by other incidental adjustments, for the restoration and maintenance of health." (emphasis added). Conversely, Ark. Code Ann. § 17-93-102(6)(B)(c) defines the "practice of physical therapy to include any: mobilization, i.e., passive movement accomplished within normal range of motion of the joint, but excluding spinal manipulation and adjustment." Under one act, physical therapy practice of mobilization is unlimited, under another spinal mobilization is limited, and both constitute passive movement.

should not be *raised and developed* at the administrative level," (emphasis in original) (the "Rule"). *Id.* at 279. The apparent justification of this contradictory ruling, is found in the court's prior ruling that "the development of facts before [an administrative body] is critical . . . the agency is the only forum where a full development of the facts and law can occur; without that complete development of the facts and arguments . . . this court cannot fulfill its reviewing function." *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Commission*, 69 Ark. App. 323, 13 S.W.2d 197 (2000).

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to address an issue of great national importance regarding the Constitution.

The Arkansas Supreme Court has used a local practice to deny a right granted to Mr. Teston by the federal Constitution, and therefore, he has not received the process he is due under the U.S. Constitution. It has been clearly established that this Court will protect an individual's federal rights from being limited by local practice. *Felder v. Casey*, 487 U.S. 131, 138 (1988). The ruling of the Arkansas Supreme Court in Mr. Teston's case is a direct attack on this long held principle and is also in violation of the Supremacy Clause and the Due Process Clause of the U.S. Constitution. Therefore, this Court's intervention is needed, and several aspects of this case make review especially appropriate:

First, review is warranted to resolve a conflict between Arkansas law and decisions of this Court regarding the rights of individuals to have federal rights protected and not denied as a result of a local practice. In this case the pointless procedural practice of requiring Mr. Teston to raise his